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No. 04-480

IN THE

Supreme Court of the United States

METRO-GOLDWYN-MAYER STUDIOS INC., *et al.*

Petitioners,

v.

GROKSTER, LTD., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF MACROVISION CORPORATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Amicus curiae will address the following questions:

A. **WHETHER RESPONDENTS' FILE-SHARING SERVICES ARE DESIGNED TO FACILITATE COPYRIGHT INFRINGEMENT.**

B. **WHETHER RESPONDENTS' FILE-SHARING SERVICES ARE FUNCTIONALLY EQUIVALENT TO THE ILLEGAL NAPSTER SERVICE.**

C. **WHETHER A FINDING THAT RESPONDENTS' FILE-SHARING SERVICES VIOLATE THE COPYRIGHT ACT WILL IMPEDE THE DEVELOPMENT OF TECHNOLOGIES WHICH LAWFULLY FACILITATE THE DISTRIBUTION OF COPYRIGHTED WORKS ON THE INTERNET.**

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Rule 37 of the Rules of the Court, Macrovision Corporation respectfully submits this Brief Amicus Curiae in support of Petitioners.[1] This Brief is filed with the parties' written consent.

Founded in 1983, Macrovision Corporation is a leading developer of digital rights management and software licensing technologies designed to combat Internet piracy, while offering technological solutions that enable its customers to electronically control the use of digital content. Headquartered in Santa Clara, California, Macrovision has patented a wide variety of copy protection and digital rights management technologies for the entertainment and enterprise software industries. These technologies have been utilized in over 8.5 billion DVDs and VHS cassettes, 300 million CD-ROMs and 400 million music CDs. Macrovision's anti-piracy technology has also been embedded in DVD players, PC/DVD drives, DVD-enabled game consoles as well as cable and satellite television digital set top boxes and hard drive recorders.

As a consequence of its leadership and expertise in the digital rights management field and in the development of its patented anti-piracy technologies, Macrovision is intimately familiar with Respondents' file-sharing services and the core

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[1] No party or counsel for a party to this case authored this Brief in whole or in part, and no person or entity other than amicus curiae or its counsel has made a monetary contribution to the preparation or submission of this Brief.

characteristics of those services.. Given its special expertise, Macrovision Corporation believes that its assessment of Respondents' services will materially aid this Court in deciding this case.

SUMMARY OF THE ARGUMENT

Whether Respondents' file-sharing services violate the Copyright Act rests in part upon whether those services are designed to promote and facilitate the unrestricted and unauthorized duplication and transmission of copyrighted works. In this case, these are in fact the principal purposes furthered by Respondents' services. Indeed, they are the functional equivalent of the Napster file-sharing service which was found by the Ninth Circuit to have violated the Copyright Act. A finding by this Court that Respondents' file-sharing services also violate the Copyright Act will not impede the development of technologies which promote and facilitate the lawful acquisition, duplication and distribution of copyrighted works on the Internet.

Like Napster, Respondents' file-sharing services are primarily designed, operated and used for the infringement of copyrighted works. As such, this Court should reverse the Ninth Circuit's decision and direct that judgment be entered in favor of Petitioners.

ARGUMENT

A. RESPONDENTS' FILE-SHARING SERVICES ARE DESIGNED TO FACILITATE COPYRIGHT INFRINGEMENT

As this Court held in the *Sony Corp. of America, Inc. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) ("*Sony-Betamax*"), "[f]rom its beginning, the law of copyright has developed in response to significant changes in technology." *Id.* In that case, this Court was confronted with a consumer product, the video tape recorder, which served a wide variety of commercially significant non-infringing uses. *Id.* at 442-456. Because the manufacturer of the video tape recorders lost complete control over their use once they were sold to consumers, they were equated with the sale of copying equipment and other "articles of commerce." *Id.* at 442.

In this case, the Court is faced with so-called "file-sharing" services offered by Respondents which are primarily designed, operated and used for the infringement of copyrighted works. Moreover, Respondents maintain and exercise control over their services through an ongoing interactive relationship with those who use their services and also have the ability to control access to their services and how they are used. As such, Respondents are not passive distributors of software, but service providers whose revenues are derived largely from the infringement of copyrighted works.

The illegal purpose of Respondents' services is evident from the design of their file-sharing software and its operational characteristics. Although the software of Respondents

Grokster and Streamcast differ in some respects, they share one common critical feature — they are designed expressly for the purpose of inducing and facilitating the unauthorized and unrestricted acquisition, duplication and distribution of copyrighted works on an unprecedented scale.

1. GROKSTER, LTD.

Respondent Grokster, Ltd. is a licensee of the "FastTrack" file-sharing distribution platform which is owned by Sharman Networks, Ltd., a defendant in the case below against which this action has been stayed pending a resolution of this appeal. JER 0790, 0814-0815.[2] Grokster developed its software based file-sharing service so that those who downloaded its software could gain *free* access to a vast trove of copyrighted audio recordings and motion pictures available on the FastTrack "peer-to-peer" network. JER 0790. Many of these copyrighted works are contained in MP3 data files which can be downloaded, copied and re-transmitted among all other users of the Grokster software. JER 0786-0792.

a. Key Functions Of The Grokster Software

Upon downloading the Grokster software, which is provided at no cost to the user, the user's personal computer becomes an integral part of the FastTrack file-sharing network. JER 0789-0792. As directed by the Grokster software, the

[2] All citations to record evidence are to material in the Joint Excerpts of Record ("JER") before the Ninth Circuit.

user's computer serves as a storage site and transfer mechanism for data files containing copyrighted works and indices of those files which are automatically made available to other users of the Grokster software. *Id.* That software also enables each user to access directories or indices of copyrighted works in other users' computers by typing in key words such as the name of a recording artist, a movie, music CD title, or other identifiers like "Top 40." JER 0791-0792. In fact, the user interface of the Grokster software is particularly structured to conform with the basic structure of music and movie content, the predominant source of illegally copied content. JER 0791.

The search function built into the Grokster software scans its database for content available on other computers using the Grokster software. JER 0791-0792, 0814. Ninety percent (90%) of this available content are copyrighted works not authorized for copying or distribution by the copyright owners. Nevertheless, the Grokster software retrieves and transmits the source location of the copyrighted song or movie identified by the user directly to that user's computer. JER 0791-0792. At that point the user downloads the copyrighted work from the source location and automatically creates a digital copy of that work on the user's personal computer. *Id.* This digital copy can now be re-transmitted to others who are connected to the FastTrack file-sharing network by the Grokster software. *Id.* Prof. Leonard Kleinrock, one of the most prominent computer scientists in the country, characterized this process as the "viral dissemination" of copyrighted works. JER 0792.

The principal function of the Grokster software based file-sharing service — providing unauthorized access to copying of copyrighted works — is further enhanced by the conversion of certain users' personal computers into so-called "supernodes" which are able to store, index and instantly transmit vast numbers of MP3 data files containing copyrighted music and movies to other Grokster software users. JER 0793-0794. Significantly, the Grokster software actually commandeers certain users' computers to act as "supernodes" without their control. *Id.* Thus, Grokster not only provides users with immediate access to copyrighted works but also exploits the capacity of the FastTrack file-sharing network to facilitate the illegal piracy of copyrighted works on an exponential basis. *Id.*

An examination of the search features in the Grokster software confirms its illegal purpose. These search features are specifically designed to make it very easy for a user to locate copyrighted movies and music. JER 0791-0792. Users of the Grokster software can specify the type of content they are looking for (music or video) and further refine this search by identifying additional attributes of the copyrighted content such as in the case of music files, the name of the artist, album or track. *Id.* This entire process is possible because the data file directory services needed to locate the copyrighted works are supplied by the Grokster software. JER 0794. As a consequence, the Grokster software provides a functionality specifically designed for enabling unauthorized access to copyrighted music and movies.

b. <u>Grokster's Infringement Driven Revenue Stream</u>

Further, Grokster generates substantial revenues by displaying advertisements to users of its file-sharing services once they download the Grokster software. JER 0796-0797. Having obtained a user's Internet Protocol ("IP") address, Grokster is able not only to send advertisements to the person at their IP address, but also provides them with upgraded versions of the Grokster software, allowing them access to an ever increasing number of copyrighted works. JER 0806-0807. The Grokster software also offers users of its file-sharing service the ability to conceal their identities from copyright owners attempting to identify those who are illegally downloading their copyrighted works. JER 0808.

Grokster is reaping substantial profits because those who use its service get <u>free</u> access to copyrighted works which they then copy and distribute to others with security and anonymity. Because Grokster and its users pay nothing for the copyrighted content, Grokster generates pure revenue from the advertising it sends to users of its filing-sharing service; the more users Grokster can attract, the more advertising revenue it receives. The more copyrighted content Grokster can provide through its service, the more users it attracts. As such, Grokster benefits from an ever-increasing number of copyrighted works available through it service, regardless of whether that content can be legally copied. Simply put, Grokster's profits are made possible only because its service enables, induces and facilitates copyright infringement.

c. Grokster's Control Over Its Services And Ongoing Interactive Relationship With Its Users

Grokster maintains its substantial revenue stream through continuous interaction with users of its software, and by its ability to control and enhance the quality of its file-sharing service through software upgrades and other measures. JER 0801-0807. It also can restrict its users' access to the FastTrack file-sharing network. JER 0808-0809. For example, Grokster's software gives it the ability to deny access to the FastTrack file sharing network to those who have not downloaded upgraded versions of the Grokster software. JER 0808. Grokster originally required users of its software to use passcodes to gain access to the FastTrack file sharing network, but eliminated the passcode access control feature shortly after Petitioners filed suit. JER 0808. Grokster also uses central servers to send its advertising to users of its file-sharing service. JER 0796.

Because the demand for copyrighted content drives the demand for its file-sharing service, Grokster has taken no steps whatsoever to restrict or prevent the unauthorized acquisition, duplication or distribution of copyrighted works, although it is able to do so. JER 0811-0816. While Grokster uses filters to help users avoid downloading files that may contain computer viruses, no such filters are used by Grokster to screen out unauthorized copyrighted works even though this can be done by tracking the "metadata" in each media file. JER 0812-0821. Rather than use the "metadata" filtering technologies to block users' access to copyrighted works, Grokster's software actually uses this technology to help users block "bogus" music or movie files which lack

copyrighted content. JER 0818-0819. Further, Grokster's ability to control "search placement" (i.e., placing the paid content of advertisers at the top of users' search results) also shows that it has the capability to control its users' access to copyrighted works. JER 0796-0797.

d. Grokster's Aggressive Promotion Of Infringing Activity

In the quest for more infringement generated revenue, Grokster also offers incentives to its users to share more of the copyrighted content on their computers with their peers. For example, Grokster rewards users who trade greater quantities of content by providing them with better search results and faster download speeds. To gain credits for enhanced services, users therefore must share an ever increasing amount of infringing content.

Grokster offers its users "help lines" to help them access copyrighted works with the Grokster service and to solve any operational problems users may have. JER 0807, 4968, 4980. On numerous occasions when users explicitly reported they were attempting to download copyrighted works, Grokster personnel gave them the technical support they needed to accomplish the infringements. JER 0807. A "newsletter", chat room and bulletin board are also included in the Grokster service. JER 4968, 4980. Grokster actually boasts of the high quality of the support it provides its users and lures new users by inserting the word "Napster" in the metatags of the Grokster website. JER 3033-3035, 6233-6234. It is therefore no surprise that Grokster is an

infringement driven enterprise operating in a brazen and lawless manner.

2. STREAMCAST, LTD.

Streamcast's file-sharing service has all the key features and functionality of Grokster as discussed above. Like Grokster, Streamcast enables users of its software to access data files containing copyrighted works from the personal computers of other users. JER 0797-0798. Unlike Grokster, Streamcast's service is based upon the "Gnutella" file sharing technology, which does not connect to the FastTrack file-sharing network, but to a peer to peer ("P2P") network which includes users of the Streamcast software. JER 0798. Nevertheless, the Streamcast service also searches data files available on users' computers and enables user-to-user file transfers. *Id.* As with Grokster, the file directories in the Streamcast system do not reside on central servers but on users' computers. *Id.*

Key features of the Streamcast file-sharing service include the following:

1. Gives users ongoing access to a continuous source of IP addresses of other computers connected to the Gnutella-based file sharing network;
2. Operates certain personal computers as "ultra peers" that perform tasks comparable to the so-called "supernodes" accessed by Grokster software users;
3. Collects file metadata from MP3 files to improve users searches, including enabling "category" searches to help users find, for example, "Top 40" songs;
4. Displays content from Streamcast web servers and displays advertisements transmitted from central servers to users of the Streamcast software;
5. Provides filters to help users avoid downloading files that may contain viruses; and
6. Provides auto updates "i.e. automatic messages triggered by a communication from a central Streamcast server" so that upgrades to the software are quickly and widely distributed to the users.

JER 0799-0800; JER 1934-1982. Streamcast also maintains continuous two-way communications between its users and the Streamcast central servers which send advertising to those users. JER 0800.

3. BOTH GROKSTER AND STREAMCAST PROVIDE ROADMAPS TO FIND AND INFRINGE COPYRIGHTED MUSIC AND MOVIES

Both Grokster and Streamcast built their original base of infringing users on systems identical to the Napster system. JER 0789-0790. In further expanding their user base, Respondents targeted those who had left Napster after it had been found to be illegal by the Ninth Circuit. JER 0789-90,

2347-2348, 2364, 5626-5628, 5932. As discussed *infra*, Respondents' file-sharing services differ in no material respect from the illegal Napster service. They in fact share the same basic features which make all three services infringement driven.

Although they differ in some technical details, the Grokster and Streamcast services provide their users with a virtual roadmap to find and infringe copyrighted music and movies. In sum, they actively (and very profitably) facilitate infringement by:

1. Providing an infrastructure for users to search for, copy, and distribute copyrighted music, motion pictures, and other works without the authorization of the copyright owner;
2. Providing their users free of charge with the proprietary software that is required to become part of, and to access, their systems;
3. Engaging in regular communication with users' from their central servers for the purpose of announcing the availability of versions of their software;
4. Providing their users with upgrades and updates of their proprietary software, free of charge, to add features that enhance the user "experience";
5. Modifying their software and the various programs that run on their central servers in order to maintain or improve the performance and/or security of the systems;

6. Operating from their own central servers programs to handle user registration and login functions;
7. Selecting and embedding the Internet addresses of multiple supernodes in the user software, and periodically updating this list of supernode addresses, to enable or facilitate users' connection to their systems;
8. Employing central servers under their control to monitor supernodes on the system to facilitate the efficient performance of the system;
9. Engaging in regular communication with supernodes (up to every 12 hours) for the purpose of causing them to cease operating as supernodes if they are not running the latest version of the user software;
10. Operating from their own central servers specialized supernodes, known as "root" or "seed server" supernodes, thus maintain directories of files available from the users connected to those root supernodes, and process search requests from those connected users;
11. Monitoring the performance of their systems and user software centrally, and actively working to address performance problems and/or to improve the user experience;
12. Improving or changing the performance, security and/or functioning of their systems or

user software centrally, by modifying variables in programs running on their central servers; and

13. Taking steps to maintain the anonymity of their users and the secrecy of their activities, and to protect their systems by encrypting many of the computer-to-computer communications that take place on the FastTrack network.

JER 0780-0823; JER 1934-1982. Having decentralized the location of their indices of copyrighted works, Respondents have actually taken the Napster model to the next level and created even more efficient and profitable infringement driven enterprises.

B. RESPONDENTS' FILE-SHARING SERVICES ARE FUNCTIONALLY EQUIVALENT TO THE ILLEGAL NAPSTER SERVICE

In its opinion, the Ninth Circuit stated that the Napster file-sharing service:

> [E]mployed a proprietary centralized indexing software architecture in which a collective index of available files was maintained on servers it owned and operated. A user who was seeking to obtain a digital copy of a recording would transmit a search request to the Napster server, the software would conduct a text search of the centralized index for matching files, and the search results would be transmitted to the requesting user. If the results showed that another Napster user was logged on to

> the Napster server and offering to share the requested recording, the requesting user could then connect directly with the offering user and download the music file.

Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 380 F.3d 1154, 1159 (9th Cir. 2004) ("*Grokster*"). *See A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011-1012 (9th Cir. 2001) ("*Napster I*"). Relying principally on the centralized storage of Napster's data file indices, the Ninth Circuit found that Napster's file-sharing service violated the Copyright Act, 17 U.S.C. § 101 *et seq*. *See Napster I*, 239 F.3d at 1027-1028. According to the appellate court, this centralization gave Napster's operators sufficient control over the use of their service to hold them accountable for contributory copyright infringement. *Id*. at 1023-1024.

Napster maintained multiple central servers (i.e., computers operated by Napster itself) containing indices of files available on its users' computer. *Napster I*, 239 F.3d at 1012. Napster users searched those indices to find recordings they wanted, although the files themselves were distributed directly from one user to another. *Id*. at 1014. In this case, the Ninth Circuit assumed that the decentralized storage of data file indices by Respondents somehow made their services materially different from those of Napster. *Grokster*, 380 F.3d at 1162. The court also found that because of the decentralized storage feature Respondents could not control the use of their services, whereas the Napster defendants could. *Id*. The Ninth Circuit is wrong on both counts.

As to the first point, the essential functionality provided by Napster was to allow users to access, duplicate and redistribute copyrighted works without having to pay for those works. Respondents' services perform the same basic function, but do so while storing the indices of the data files in their users' personal computers. In Respondents' services, the role of the Napster central server is simply played by the individual user's personal computers operating as "supernodes" or "peer nodes," both of which collectively perform the same function in concert with Respondents' software. With respect to the second point, as previously explained by decentralizing the search function in their software, Respondents did not lose control over their services or their ability to interact with their users. Maintaining an ongoing and fully interactive relationship with their users is critical to the revenue model used by both Respondents. They relinquished control over certain features, like the access passcodes, only when it served their own purposes.

The users' experience is also the same as Napster. Without paying any license fees to the copyright owners, they can access, download and transmit copyrighted works by using certain key words that initiate a search of a database of copyrighted works created and maintained by Respondents' software. Whether the indices of those works are stored in a central server or on individual users' personal computers under the control of Respondents' software does not affect the users' experience or change the basic function of Respondents' file-sharing services. The functional equivalency of the Napster service and those of Respondents is therefore beyond question.

C. A FINDING THAT RESPONDENTS' FILE-SHARING SERVICES VIOLATE THE COPYRIGHT ACT WILL NOT IMPEDE THE DEVELOPMENT OF TECHNOLOGIES WHICH LAWFULLY FACILITATE THE DISTRIBUTION OF COPYRIGHTED WORKS ON THE INTERNET

Should this Court find that Respondents' software based file-sharing services violate the Copyright Act, the further development of lawful means of acquiring copyrighted works on the Internet will not be impeded. Over the last few years, the Internet-based delivery of copyrighted content has undergone a technological revolution. There are now many online services which, in exchange for the payment of an access or license fee, allow consumers to download copyrighted songs and movies. Two of the most prominent services are MovieLink and iTunes.

MovieLink is an online service created by a consortium of motion picture studios for the purpose of making movies available to consumers on the Internet. Unlike Napster and Respondents' file-sharing services, MovieLink is an excellent example of how copyrighted content can be provided to consumers in a secure and lawful manner.

Using a high speed data connection, a consumer can log on to the MovieLink website and download a movie by paying an access fee with their credit card. Consumers may choose from a directory of movie titles which is stored in a central server and accessible only through the use of a passcode given to the consumer once they have paid their access

fee (which ranges from $1.99 to $4.99). Consumers may have access to movies from MovieLink for up to thirty (30) days after downloading them. Secure delivery of these movies over the MovieLink website is made possible by encryption software and other anti-piracy security measures embedded in the movies themselves.

iTunes is an online music service owned and operated by Apple Computer. Like MovieLink, iTunes allows consumers to download copyrighted content from its website for a fee. Upon payment of that fee, the consumer is given access to a library of copyrighted songs which can be downloaded on the consumer's computer. As in the case of MovieLink, encryption software and other anti-piracy technologies allow iTunes to provide copyrighted songs to consumers in a secure and lawful manner.

MovieLink and iTunes are but two examples of how digital technologies are being used to provide for the secure distribution of copyrighted works on the Internet. They demonstrate that lawful means of providing copyrighted content to consumers is very much a reality. A finding that Respondents' file-sharing services violate the Copyright Act will actually promote and encourage the development of similar technologies in the future.

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

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